(41)

आदेश पत्रक

मामला क्रमांक ..CA:1557/99 **सन्** **200**

..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

APPELLANT Deepak Yadav, S/o. Sadhuram Yadav, aged 25 years, R/o. Shanti Nagar Ward, No. -5, Rajnandgaon, Police Station and District Rajnandgaon (C.G.)

Versus

RESPONDENT State of Chhattisgarh, through, P.S., Rajnandgaon, Distt. Rajnandgaon (C.G.)

D.B. : Hon'ble Shri L.C. Bhadoo and Hon'ble Shri Dhirendra Mishra, JJ.

17-4-2007

Shri Saurabh Dangi, Advocate for the appellant.

Shri U.N.S. Deo, Additional Public Prosecutor with Shri C.R. Sahu, Panel Lawyer for the respondent/State.

Arguments heard.

Oral judgment dictated on *Dais*.

ORAL JUDGMENT

Per L.C.Bhadoo, J. :

This appeal is directed against the judgment of conviction and order of sentence dated 17-5-1999 passed by Sessions Judge, Rajnandgaon in S.T. No. 3/99, whereby the learned Sessions Judge after holding accused/appellant guilty for commission of offence under Section 302 of the Indian Penal Code, sentenced him to undergo imprisonment

(पीछे देखिये)

(42)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

for life, to pay a fine of Rs. 500/-, and in default of payment of fine, to further undergo two months' R.I.

2. Case of the prosecution, in brief, is that P.W. 1 Koshalyabai lodged report Ex. P-1 in the Out Post, Chikhli of Police Station Rajnandgaon to the effect that at about 9.30 p.m. in the night his son Ghanshyam along with his minor child went for strolling on road after taking meal. There Deepak son of Sadhuram was standing. He asked Ghanshyam to arrange for liquor. Ghanshyam replied why he should arrange for liquor. On this, Deepak threw Ghanshyam on the ground and said that why he is not arranging liquor. On this, she rushed to save Ghanshyam and her grand-son. While she was helping Ghanshyam and her grand-son, she said that why he is attacking, Deepak threw her on the ground after catching her by her heirs. Persons namely Pratap, Bhuru and Raju who were standing at the place, took Ghanshyam to the house. When they came to their house, her husband enquired from them as to what has happened, on which she disclosed that Deepak is asking Ghanshyam for liquor. Her husband came out of the house. She also followed him. Her husband asked Deepak as to why he attacked

(पीछे देखिये)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

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Ghanshyam. On this, accused Deepak attacked her husband on his head with axe which he was holding. Her husband fell down. Deepak said that he will finish him and Deepak attacked her husband on his head with axe. She raised cries. Hearing her cries, nearby persons Shyamrao, father of Santosh, Bharat and others came on the scene. Receiving this report, Shaukat Ali, in-charge of Police Chowki, Chikhli registered Ex. P-1 and the same was sent to Police Station Rajnandgaon where F.I.R. Ex. P-1A was registered. Investigating officer left for the scene of occurrence, prepared site plan Ex. P-2. Bhaiyalal was taken to Hospital where he succumbed to the injuries. Investigating officer after giving notice Ex. P-3 to Panchas, prepared inquest on the body of Bhaiyalal. Injuries of Bhaiyalal were examined by Dr. V.K. Damle, he prepared injury report Ex. P-14-A. He found one incised wound horizontally placed on parietal region in size of 10cm x 3cm x 4 cm, bleeding and brain was coming out, one incised wound on left side between eyelid to temporal side in size of 6cm x 2cm x 2cm, bleeding present, one incised wound in size of 4cm x 3cm x 3cm on index finger of left palm, there was bleeding;, one abrasion on left forearm with bleeding in size of 3cm x 1cm x ½ cm, condition of the patient

(पीछे देखिये)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

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was very poor, respiratory pulses were feeble. Investigating officer made application Ex. P-15 to Assistant Surgeon, District Hospital, Rajnandgaon, as to whether Bhaiyalal is in a position to give statement, on which the doctor opined that Bhaiyalal is not in a condition to give statement. In the night he succumbed to the injuries. After death of Bhaiyalal merg under Ex. P-27 was sent to Police Station, based on that, offence was converted into Section 302 of I.P.C. Therefore, vide Ex. P-16 request was sent for post mortem examination. Post mortem examination was conducted by Dr. B.C. Jain (P.W. 10). He prepared post mortem report Ex. P-16-A. He opined that cause of death was haemorrhage and head injury, laceration of left cerebral of parietal region. The axe was sent for examination to doctor under Ex. P-17. The doctor opined that injuries present on the body of Bhaiyalal could be caused by the axe in question. He gave report Ex. P-17A. Injuries of Ghanshyam were also examined, injury report Ex. P-20A was prepared by the doctor.

3. After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate, Rajnandgaon, who in turn committed the case to the Sessions Judge, Rajnandgaon.

(पीछे देखिये)

(45)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	4. Prosecution examined 16 witnesses at the trial. Statement of accused was recorded under Section 313 of Cr.P.C. in which he denied the material appearing against him. He stated that he is innocent, he has been falsely implicated in the crime. He further stated that at about 7.00 pm he was cracking jokes with son of Bhaiyalal namely Ghanshyam, on which Ghanshyam gave beating to him, as a result of which, he received injuries. He was at his residence and the report was lodged against him, he has been falsely implicated in the crime. He also examined two defence witnesses namely D.W. 1 Dilip Yadav and D.W. 2 Dr. B.P. Maheshwar, who examined the injuries present on the person of the accused. 5. Learned Sessions Judge after hearing the counsel for the respective parties, convicted and sentenced the accused as aforementioned. 6. We have heard Shri Saurabh Dangi on behalf of the accused-appellant and Shri U.N.S. Deo with Shri C.R. Sahu on behalf of the State.	

(पीछे देखिये)

(16)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

7. Homicidal death of Bhaiyalal has not been disputed by learned counsel for the appellant, moreover P.W. 1 Koshalyabai, wife of the deceased who witnessed the crime in question has stated that accused Deepak attacked her husband Bhaiyalal with axe. Dr. B.C. Jain (P.W. 10) who conducted post mortem has stated that on 10-11-1998. He has stated that there was an incised wound on skull, parietal bone was fractured, brain material was visible from fracture and coming out of the skull, brain was crushed and lacerated, there was incised wound extending from below lower eyelid to zygomatic prominence, there was fracture of ring finger. Cause of death was haemorrhage on account of head injury. He opined that head injury was sufficient in ordinary course of nature to cause death. His report is Ex. P-16A. Therefore, in view of the above ocular and medical evidence, it is established that death of Bhaiyalal was homicidal in nature.

8. As far as involvement of accused appellant in the crime in question is concerned, P.W. 2 Ghanshyam, son of the deceased has stated that accused is resident of same vicinity, on the fateful night at about 9.30 p.m. he was strolling on road along with his child. At that time, accused Deepak came

(पीछे देखिये)

(47)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

there. He slapped him and said as to why you are sitting there, on which, he raised cries and his mother came on the scene. Boys of the vicinity took him to residence. While giving beating to him, accused was saying that you have to arrange liquor for him. Thereafter his father went out of the house saying that he will go and advise Deepak. Thereafter in front of house of Jairam, accused attacked his father with axe. He heard commotion, came out of the house and saw that his father was lying and accused was sitting there holding axe in his hand, police also came on the scene and, thereafter his father was taken to hospital in a Tempo. P.W. 1 Koshalyabai has stated that accused Deepak is known to her. At 9-11-1998 her husband died. Accused is resident of her vicinity. On the fateful day at about 7.00 p.m. there was a scuffle between her son Ghanshyam and Deepak. Thereafter she took her son to the house. When after separating them, they were going to house, she and her husband was behind them, at that time, accused came with axe and attacked on head of her husband 4-5 times, as a result which her husband became unconscious. She raised cries but nobody came out and her husband was taken to the hospital in Tempo. Ghanshyam also went to the hospital. Thereafter police

(पीछे देखिये)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

people came and she lodged report Ex. P-1 in the police station.

9. Learned counsel for the appellant Shri Saurabh Dangi argued that, material witness Jairam in front of whose house, the incident took place, has not been examined by the prosecution, particularly when Koshalyabai was the only witness examined, therefore, it was necessary to examine the independent witness Jairam in order to establish the charge against the accused, therefore, testimony of Koshalyabai cannot be believed without any corroboration on account of contradictions, omissions and infirmities in her evidence. Injuries sustained by the accused have not been explained by the prosecution. Therefore, the accused is entitled for acquittal. He placed reliance on the judgment of Apex Court in the matter of **Takhaji Hiraji –v- Thakore Kubersingh Chamansingh and another** reported in **(2001 6 SCC 145**, **State of Punjab -v- Harbans Singh and another** reported in **(2003) 11 SCC 203**, **Zahira Habibulla H. Sheikh and another –v- State of Gujarat and others** reported in **(2004) 4 SCC 158**, **Kalyan –v- State of U.P.** reported in **(2001) 9**

(पीछे देखिये)

(U9)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

SCC 632 and **Subramani and others –v- State of Tamilnadu** reported in **(2002) 7 SCC 210**.

10. On the other hand learned counsel for the state supported the judgment of the trial Court.

11. Having heard the learned counsel for the parties, we have perused the record of the trial Court.

12. As far as non-examination of Jairam is concerned, perusal of the order sheets of the record of the trial Court shows that witness Jairam, in fact, was summoned to give evidence. On 8-3-1999, son of Jairam namely Sunil moved an application that Jairam is paralytic and he is unable to walk. Again he was summoned and perusal of order dated 12-3-1999 shows that Jairam was paralytic and he was unable to walk. This witness was abandoned by the prosecution. Therefore, for the above reason, it cannot be said that Jairam was not examined by the prosecution without any reason. Regarding non-examination of witness, the Apex Court in the matter of **Takhaji Hiraji** (supra) held that if overwhelming reliable evidence is already available and examination of other witnesses would only be a repetition, non-examination of

(पीछे देखिये)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

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such witnesses would not affect the prosecution case. In the present case, it is true that only two eye-witnesses namely P.W. 1 Koshalyabai, wife of the deceased and P.W. 2 Ghanshyam, son of the deceased have been examined. Jairam has not been examined, but for the reason that he became paralytic and was unable to walk, therefore, it was not possible for the prosecution to examine that witness and in the circumstances, no adverse inference can be drawn against the prosecution for non-examination of Jairam. In the matter of Harbans Singh's, only two witnesses were examined and the other witness namely Darshan Singh who witnessed the incident and carried the deceased to the hospital and most of time, he was with them, was not examined, the Apex Court held that since clothes of the witnesses P.W. 4 and P.W. 11 were not found stained with blood, therefore, there is considerable doubt about presence of these witnesses at the time of incident and the non-examination of Darshan was held to be fatal for prosecution.

13. In the present case, in fact, Jairam was summoned and he became paralytic and it was not possible to examine him and he was abandoned. Therefore, judgments cited by learned

(पीछे देखिये)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

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counsel for the appellant regarding non-examination of the witness are of no help to the accused looking to the facts of the case.

14. As far as non-explanation of the injuries present on the person of the accused is concerned, in the matter of **Takhaji Hiraji** (supra), the Apex Court held that it cannot be held that as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so, the prosecution case should be disbelieved. Before non-explanation of the injuries on the person of the accused persons by the prosecution witnesses may affect the prosecution, the Court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the evidence gives a version which competes in probability with that of the prosecution. In case of **Subramani and others** (supra), the Apex Court held

(पीछे देखिये)

(52)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

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that the fact that injuries were simple, does not relieve the prosecution of its obligation, on failure, court can draw inference that prosecution has not presented the true version of the occurrence. In the light of the above judgments, if we examine the present case, the D.W. 2 Dr. V.P. Maheshwar who examined the accused has stated that there were following injuries (i) One contusion on left elbow joint size 4" x 4", reddish in colour; (ii) contusion on palm of left hand in size of 3 cm x 2 cm, reddish in colour; (iii) Abrasion on right ring finger in size of 1 cm; (iv) one contusion on left thigh in size of 3cm x 2cm, reddish in colour; and (v) one contusion on left thigh 3cm x 1 ½ cm reddish in colour. For injury No. 1, X-ray was advised and injuries No. 2 to 5 were simple which were caused by hard and blunt object. There was no blood marks on the clothes of the accused. In the first instance, there is nothing on record to show that injuries were grievous or fatal in nature. P.W. 1 Koshalyabai has stated in her evidence that there was scuffle between his son and the accused and thereafter she brought her son to the house, moreover P.W. 2 Ghanshyam has also stated that there was scuffle between him and accused, therefore, it was possible to sustain simple injuries in the scuffle. Therefore, we are of the

(पीछे देखिये)

(53)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

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considered opinion that the point raised by the counsel for the accused does not affect the case of the prosecution.

15. The third point raised by the counsel for the appellant-accused that there are inconsistencies and contradictions in the evidence of P.W. 1 Koshalyabai with her statement recorded under Section 161 of Cr.P.C. under Ex. D-1 as also First Information Report. He has drawn the attention of this Court on the contradictions.

16. We have perused the evidence of Koshalyabai. In paras 12 and 13 of her evidence, she has stated that while giving report Ex. P-1 and statement Ex. D-1, she disclosed that when they were returning after separating the accused and Ghanshyam, her husband was behind, why it was not written in Ex. P-1 and Ex. D-1, she does not know. She also disclosed before the police that the accused brought axe from house and assaulted 4-5 time in the head, on which, she raised cries, why these things have not been written in the Ex. P-1 and Ex. D-1, she does not know. She has further stated that Deepak has not caught her from her heirs and she had not intervened when Deepak and Ghanshyam were quarreling nor

(पीछे देखिये)

आदेश पत्रक

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she separated them and she even not touched them. The portion that "Ghanshyam .....thrown on the ground" she does not disclosed in Ex. P-1 and Ex. D-1. It is true that there are some contradictions between the evidence of P.W. 2 and his police statement Ex. D-2 but we have to appreciate the evidence of P.W. 1 Koshalyabai and P.W. 2 Ghanshyam in totality. P.W. 2 Ghanshyam, son of the deceased has stated that after taking dinner, he was strolling on road with his child. At that time accused met him and slapped him, and demanded liquor. Thereafter, he raised cries. Hearing commotion, his mother came and intervened, she took him in the house. Thereafter when they went to house, Bhaiyalal, father of Ghanshyam and husband of Koshalyabai, came to know about the incident. He said that he will go outside and advise Deepak. He went outside, Deepak attacked him with the axe on his head. Evidence of these two witnesses is corroborated by the medical evidence of doctor P.W. 16 Dr. V.K. Damle, who has stated that there was incised wound on head obliquely placed on both parietal bones and another incised wound on left temporal region, there was another incised wound on index finger, and abrasion on the forearm.

(पीछे देखिये)

आदेश पत्रक

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	17. As far as the argument of the counsel for the appellant that P.W. 1 Koshalyabai has stated that 4-5 assaults were made by the accused on head, her statement was recorded after 4 months of the incident, therefore, there was every possibility of such contradictions. As many as three incised wounds on the head and hand and one abrasion on the hand of the deceased as per medical evidence were found. The hand injuries must have been sustained while protecting himself from the attack of the accused, therefore, looking to the offence and medical report, much importance cannot be attached to the above inconsistencies or so called contradictions in the evidence of P.W. 1 Koshalyabai. Moreover, it is common knowledge that when a person is attacked with deadly weapon like axe, it is very difficult for any witness to count that how many times the accused has attacked the victim. The witness normally based on his memory gives evidence regarding the number of assault made by the accused. The evidence of P.W. 1 Koshalyabai and P.W. 2 Ghanshyam inspires confidence of the Court on the ground that the incident said to have taken place at about 9- 9.30 p.m. and the report was lodged by P.W. 1 Koshalyabai in the Out Post, Chikhli of Police Station Rajnandgaon at 10.00	

(पीछे देखिये)

(56)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

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p.m., therefore, the report was lodged with all promptness in which name of the accused as assailant has been categorically mentioned. Moreover in the cross-examination of these two witnesses P.W. 1 Koshalyabai and P.W. 2 Ghanshyam, the defence has not been able to elicit from these two witnesses that there was any animosity between the accused and the complainant party, on account of which they have falsely implicated the accused in such serious crime. Even the accused in statement under Section 313 of Cr.P.C. has stated that he is innocent and falsely implicated in the crime as at about 7.00 p.m. he was cracking jokes with Ghanshyam, therefore, Ghanshyam assaulted him, as a result of which he sustained injuries on hand and finger. He has further stated that at about 9.00 pm he was at his residence. He has not explained anything as to how Bhaiyalal sustained fatal injuries and why these two persons namely P.W. 1 Koshalyabai and P.W. 2 Ghanshyam have implicated the accused in such a serious crime without any rhyme or reason, does not sound to the reason. After scrutinizing the evidence of P.W.1 Koshalyabai and P.W. 2 Ghanshyam as also F.I.R. Ex. P-1 and the medical evidence which corroborates each other in material particulars, we do not

(पीछे देखिये)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... **विरुद्ध** .....

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find any material inconsistency or contradiction so as to make the evidence of these two witnesses untrustworthy or unreliable.

18. Shri Dangi lastly argued that the accused had no intention to cause death of Bhaiyalal, everything happened in a spur of moment, therefore, conviction of the accused under Section 302 of I.P.C. is not based on legally admissible evidence.

19. On the other hand, learned counsel for the State supported the judgment of the trial Court.

20. In order to appreciate the argument advanced by the learned counsel for the appellant, we have perused the ocular as well as medical evidence. The case of the prosecution is that when Ghanshyam was strolling on road with his child after taking dinner, accused appeared on the scene and asked him to arrange liquor, which was refused by Ghanshyam, on which he started quarreling and slapped Ghanshyam. Hearing commotion, his mother came and she took her son to the residence, thereafter deceased Bhaiyalal, father of Ghanshyam came out of the house saying that he will advise

(पीछे देखिये)

(98)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Deepak, why he is quarreling. When he came on the scene and asked Deepak, accused attacked Bhaiyalal with axe. The evidence of Dr. B.C. Jain (P.W. 10) who conducted the post mortem reveals that there was an incised wound on skull, injury was extending from right side to left side and was in the size of 9cm x 3cm x 5cm, parietal bone was fractured, brain material was coming out of the fracture and lacerated, another incised wound was above left eye, there was fracture. The intention of the accused can be gathered from the nature of the weapon used, the force with which he attacked, the part of the body where he attacked. The accused attacked with deadly weapon axe, that too on vital part i.e. head and he attacked with such a force that brain material was coming out through injury, therefore, the intention of the accused to cause death of Bhaiyalal was writ large. As such we are not convinced by the arguments of Shri Saurabh Dangi.

21. For the foregoing reasons, we are of the considered opinion, that there is no illegality or infirmity in the judgment of the trial Court. This appeal is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C. Bhadoo
Judge

Sd/-
DHIRENDRA MISHRA
Judge

(पीछे देखिये)